U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210

In the Matter of:

CARL R. PATRICKSON,

COMPLAINANT,

v.

ENTERGY NUCLEAR OPERATIONS, INC.,

RESPONDENT.

ARB CASE NOS. 05-069
05-070

ALJ CASE NO. 2003-ERA-22

DATE: August 31, 2007

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:
John L. Valentino, Esq., Lawrence M. Ordway, Jr., *Green & Seifter PLLC,* Syracuse, New York

For the Respondent:
Douglas E. Levanway, Esq., *Wise Carter Child &Caraway,* Jackson, Mississippi

FINAL DECISION AND ORDER

Carl R. Patrickson filed a complaint in the U. S. Department of Labor alleging that his employer, Entergy Nuclear Operations, Inc. (Entergy), violated the employee protection section of the Energy Reorganization Act (ERA or Act). The Act protects

employees who engage in certain protected activities from employer retaliation.[1] A Department of Labor Administrative Law Judge (ALJ) concluded that Entergy violated the ERA and recommended that Entergy reinstate Patrickson. The ALJ did not award Patrickson back pay or compensatory damages. Both Patrickson and Entergy appealed. We reverse.

BACKGROUND

The FitzPatrick Nuclear Facility is located near Oswego, New York. Patrickson worked at FitzPatrick for eleven years in several engineering positions under Entergy's predecessor owner, the New York Power Authority (NYPA). After Entergy bought FitzPatrick from NYPA in November 2000, Patrickson worked as a systems engineer until his termination on November 20, 2003. His job duties included monitoring systems for proper operation and proper maintenance.[2]

Throughout his tenure at FitzPatrick, under both NYPA and Entergy, Patrickson was a self-described "prolific reporter of problems."[3] He reported occupational safety issues to the Department of Labor's Occupational Safety and Health Administration (OSHA), and he reported nuclear safety issues to the Nuclear Regulatory Commission (NRC). He also often disagreed with his performance reviews and filed rebuttals to negative reviews. He believed that he received the negative performance evaluations because he reported safety issues to OSHA and the NRC.[4]

In March 2003, OSHA inspected the plant and found three occupational safety violations, one of which prompted a minimal fine. According to Brian O'Grady, Entergy's General Manager of Plant Operations, Patrickson appeared to be excited and angry about the OSHA findings. When Patrickson later encountered him, O'Grady

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1 42 U.S.C.A. § 5851(a) (West 2007). The ERA has been amended since Patrickson filed this complaint, but the amendments are not applicable here because Patrickson filed the complaint before the amendments' effective date, August 8, 2005. Energy Policy Act of 2005, Pub. L. 109-58, title VI, § 629, 119 Stat. 785 (Aug. 8, 2005).

2 Tr. 17.

3 Tr. 106.

4 Recommended Decision and Order (R. D. & O.) at 8.

testified that Patrickson was nearly yelling at him, which was definitely out of character.[5] Patrickson testified that he was not excited or angry and that there was nothing unusual about his demeanor.[6] O'Grady also pointed to a March 27, 2003 email from Patrickson. This email appears to reference the OSHA findings and read, in part, "You were not happy with what I was telling you yesterday. But, you should really not like the attached Intranet Website. I had seen this before, but probably put it at the back of my head so I could at least sleep **SOME AT NIGHT !!**" O'Grady testified that, "[W]hen somebody bolds and caps and exclamates, it's like yelling in writing to me."[7]

On March 27, 2003, Human Resources Director Glen Zimmerman, Vice President Ted Sullivan, Engineering Director Oscar Limpias, and O'Grady met to discuss Patrickson's "aberrant behavior."[8] The men decided to contact Entergy headquarters to determine what action to take, and after doing so, decided that Patrickson should undergo psychological evaluation and for-cause drug and alcohol testing.[9] They placed Patrickson on administrative leave pending receipt of the test results.[10]

Patrickson tested negative for drug and alcohol abuse. His psychological report stated that "there were no significant pathologies or any thing of that nature."[11] The report recommended, however, that Patrickson obtain "some short term counseling to deal with stress" and that he be placed in an intense behavioral observation program for no less than six months.[12]

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5 Tr. 274.

6 Tr. 82-83.

7 Tr. 278.

8 Tr. 235.

9 Tr. 220-221, 235, 238.

10 Tr. 77.

11 Tr. 244; Respondent's Exhibit (RX)-10.

12 ALJ's Recommended Decision and Order (R. D. & O.) at18.

Patrickson's Nuclear Safety Concerns

On March 31, 2003, four days after he was placed on administrative leave, Patrickson called Leonard Cline, the NRC's Resident Inspector at FitzPatrick.[13] Patrickson was worried about the water pumps at Fitzpatrick.[14] These pumps cool the steam or hot water in the reactor. If the normal water service pumps should fail due to an accident or emergency, the emergency service water (ESW) pumps take over to cool the steam. When the pumps are running, they give off heat. Patrickson told Cline that he was afraid that if there were a fire or an accident or terrorism in the Screenwell Building, where the pumps were housed, the fire dampers in the building would close and the pump rooms would not be ventilated.[15] Without ventilation, the pumps could become so hot that their motors could overheat and fail. Patrickson feared that if both sets of pumps were to fail, a nuclear meltdown might occur.[16]

When Patrickson first raised this ventilation issue in 1997, the NRC declined to investigate. The NYPA conducted an internal investigation and found no problems.[17] Patrickson, however, continued to believe that in the event of an emergency, the pump room would overheat.[18] After the September 11 terrorist attacks, Patrickson also became concerned that the 1997 NYPA investigation of the ventilation issue did not take into account what would happen in the event of a terrorist attack.[19]

On April 22, 2003, while he was on administrative leave, Patrickson wrote a letter to the Department of Labor's local OSHA office. He alleged that Entergy had "unjustly treated him as a direct result of [his] initiating an OSHA inspection of FitzPatrick and/or

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13 Tr. 85; Complainant's Exhibit (CX)-29.

14 Tr. 54.

15 A fire damper stops fires from moving from one area to another. Tr. 34.

16 Tr. 33.

17 Tr. 47-49.

18 Tr. 36.

19 Tr. 54.

showing an interest in resolving safety issues at the plant." He requested relief under both the ERA and the Occupational Safety and Health Act.[20] Patrickson did not specifically mention that he had recently told the NRC's Cline about his concerns regarding the pump room ventilation issue. But he did refer to his voicing nuclear and health concerns to the NYPA in the early 1990s and to approaching the NRC in 1997. He complained that he had been subjected to a drug test and, despite testing negative, had been placed on administrative leave and been "in a state of suspended animation" for 27 days.[21]

Shortly after returning to work on April 28, 2003, Patrickson received a letter from David Vito, NRC's Senior Allegation Coordinator. Vito was responding to Patrickson's March 31, 2003 complaint to Cline. Vito informed Patrickson that the NRC had concluded that there was no reason to believe that the ventilation issue had not been resolved in 1997.[22] Patrickson also received his 2002 performance evaluation from Zimmerman and Systems Engineering Manager Steven Bono when he got back to FitzPatrick.[23] His 2002 evaluation rated Patrickson as "needs improvement" in system knowledge and monitoring and in communication, accountability, and issue resolution.[24] The evaluation required Patrickson to comply with a performance improvement plan (PIP) in 2003 under which he had to attend bi-weekly meetings with supervisors Howse and Bono and provide them with a written progress summary of his work.[25]

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[20] 29 U. S. C. A. §§ 651-678 (West 1999).

[21] CX-55. This letter serves as Patrickson's ERA complaint. An ERA complaint need have no particular form so long so it is written and includes a full statement of the circumstances constituting the alleged violation. The complaint may be filed in person or by mail at the nearest local OSHA office. See 29 C.F.R. § 24.3 (2)(c), (d).

[22] Tr. 86-87; CX 29.

[23] Patrickson's first-line supervisor, Tom Howse, did not give Patrickson the evaluation because he was on leave when Patrickson returned to the plant. Tr. 91-92, 323, 325; R. D. & O. at 20-21.

[24] Tr. 96-97; CX-1.

[25] CX 1; Tr. 98-99, 323-324; R. D. & O. at 22. Entergy had also required Patrickson to comply with a PIP during the second half of 2002. Tr. 94-95, 118. According to Entergy's Performance Planning and Review form, the "expectation" for employees who were evaluated as needing improvement was that they would be placed on a PIP and their

On May 8, 2003, Patrickson gave Bono a written rebuttal to his performance evaluation, stating that he considered the evaluation to be a continuation of the discrimination he had experienced in the past for reporting safety problems.[26] Patrickson indicates in this rebuttal that he has attached his April 22, 2003 letter to OSHA (i.e. his ERA complaint) to the rebuttal.[27] Patrickson also states in the rebuttal that he approached the NRC in 1997 about the ventilation problem in the emergency water pump rooms and that the issue was still unresolved.[28]

From May through November 2003, Patrickson attended meetings with Bono and Howse every other week, as required by his 2003 PIP.[29] He considered these meetings to be "hostile, derogatory, and negative."[30] Bono's notes concerning the biweekly meetings from May 29 until November 20, 2003, consistently reflect Bono's opinion that Patrickson was not meeting the terms of his PIP.[31] On October 6, 2003, Bono prepared a memorandum entitled "Request to Terminate" in which he indicates that Patrickson has not performed according to the terms of his PIP, and which specified four "recent behaviors [that] have declined even further."[32] A chain of command that included O'Grady, Zimmerman, Sullivan, and in-house counsel reviewed and approved the request.[33] On November 20, 2003, Entergy terminated Patrickson.[34]

"performance will be closely managed and they must demonstrate improved job performance in the near future." CX 1 at 7.

[26] Tr. 92-93; CX-1.

[27] Id.

[28] CX-1at 2.

[29] Patrickson recorded at least seven of these meetings. These recordings are part of the record. CX-74.

[30] Tr. 99.

[31] RX-16.

[32] Tr. 372; R 20.

[33] Tr 285-286.

After Patrickson had amended his April 22 complaint to include the termination, and OSHA investigated and found that it had no merit, Patrickson appealed the OSHA findings to the Department of Labor's Office of Administrative Law Judges. After a hearing, the ALJ concluded that Entergy had violated the ERA and recommended that Patrickson be reinstated. The ALJ did not award back pay or compensatory damages because he found that Patrickson did not request them and did not establish the amount of the damages.[35] Both Patrickson and Entergy filed timely appeals with the Administrative Review Board (ARB or the Board). Patrickson also filed a Motion to Submit New and Material Evidence.[36]

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review an ALJ's recommended decision in cases arising under the ERA's whistleblower protection provision and to issue the final agency decision.[37] Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board reviews the

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[34] Tr. at 285-286; R. D. & O. at 31.

[35] R. D. & O. at 50.

[36] The additional evidence Patrickson seeks to submit pertains to whether Entergy had knowledge of his protected activity. Since we resolve this issue in Patrickson's favor, it is moot and we therefore deny the motion.

[37] *See* 29 C.F.R. § 24.8 (2005). See also Secretary's Order 1-2002 (Delegation of Authority and Responsibility to the Administrative Review Board), 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

ALJ's recommended decision de novo.[38] It is not bound by an ALJ's findings of fact and conclusions of law because the recommended decision is advisory in nature.[39]

DISCUSSION

1. The Legal Standard

The ERA provides, in pertinent part, that "[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA]."[40]

To prevail on his ERA whistleblower claim, Patrickson must prove by a preponderance of evidence that he engaged in activity that the ERA protects, that Entergy knew about this activity, that Entergy then took adverse action against him, and that his protected activity was a contributing factor in the adverse action Entergy took.[41] Even if Patrickson proves that Entergy violated the Act, Entergy may avoid liability if it

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[38] See 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; Stone & Webster Eng'g Corp. v. Herman, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); Berkman v. U.S. Coast Guard Acad., ARB No. 98-056, ALJ No. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

[39] See Attorney Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) ("the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself"). See generally Starrett v. Special Counsel, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ's findings and conclusions); Mattes v. U.S. Dep't of Agric., 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on Universal Camera Corp. v. NLRB, 340 U.S. 474, 496 (1951), in rejecting argument that higher level administrative official was bound by ALJ's decision).

[40] 42 U.S.C.A. § 5851 (a)(1).

[41] See Kester v. Carolina Power & Light Co., ARB No. 02-007, ALJ No. 2000-ERA-031, slip op. at 8 (ARB Sept. 30, 2003).

demonstrates "by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of" protected activity.[42]

2. Protected Activity and Entergy's Knowledge

As noted, the whistleblower protection provision of the ERA protects an employee who commences a proceeding under the ERA. Therefore, Patrickson engaged in protected activity when he filed his April 22, 2003 letter to OSHA because that letter is his ERA complaint. Furthermore, Patrickson attached a copy of the letter to his 2002 performance evaluation rebuttal that he gave to Bono on May 8. The first paragraph of the letter states that Patrickson's intent is "to file a formal complaint against Entergy Corporation . . . for discrimination/retaliation against me." At the end of the first paragraph, Patrickson "requests protection . . . as a 'whistleblower' . . . under . . . the Energy Reorganization Act."[43] Therefore, Bono, an Entergy manager who contributed to Entergy's decision to terminate Patrickson, was certainly aware of Patrickson's ERA complaint, and thus his protected activity.

3. Adverse Action

To succeed on his ERA claim, Patrickson must prove that Entergy took a "tangible employment action" that resulted in a significant change in his employment status.[44] This means that Patrickson must prove by a preponderance of the evidence that Entergy's action was "materially adverse," that is, Entergy's actions must have been harmful to the point that they could well have dissuaded a reasonable worker from engaging in protected activity.[45]

The ALJ determined that any adverse action that occurred before May 2003 was irrelevant because Entergy did not know about Patrickson's protected activity until then. Thus, he found that the relevant adverse actions were the "hostile, derogatory, and

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[42] 42 U.S.C.A. § 5851(b)(3)(D).

[43] CX 55.

[44] See Jenkins v. United States EPA, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 20 (ARB Feb. 28, 2003).

[45] See Hirst v. Southeast Airlines, Inc., ARB Nos. 04-116, 04-160; ALJ No. 2003-AIR-47, slip op. at 9-11 (ARB Jan. 31, 2007).

negative" bi-weekly meetings and Entergy's later decision to terminate Patrickson.[46] Termination is, of course, adverse. But does the record support a finding that Howse and Bono were "hostile, derogatory, and negative" during the bi-weekly meetings?[47]

Earlier, we noted that Patrickson recorded at least seven of the bi-weekly meetings. These recordings reveal that Patrickson did most of the talking since the purpose of the meetings was for Patrickson to submit progress summaries of his work assignments.[48] We have also examined the notes Bono made at the meetings. And we are aware of Rodney Angus's testimony. Angus also attended bi-weekly meetings as a result of a PIP and found the meetings very stressful: ""If anyone knows what an annual performance review is like, it is stressful, very stressful. Every two weeks. It was scheduled for every two weeks, lasted anywhere from 20 minutes to an hour."[49]

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[46] In his Post-Hearing Brief before the ALJ, Patrickson contended that Entergy subjected him to a hostile work environment, but the ALJ did not address this issue. Post-Hearing Brief at 18-19. In support of his claim, he relied on evidence of supervisors' threats to terminate his employment, hostile biweekly performance reviews, and supervisors' demands that he show significant improvement or be terminated. But Patrickson did not cite relevant legal authority or identify the legal standard for a hostile work environment claim. Therefore, it is not surprising that the ALJ did not address his claim. Patrickson similarly failed to adequately argue or support a hostile work environment claim before this Board. Therefore, we decline to consider the issue on appeal. See Development Res., Inc., ARB No. 02-046, slip op. at 4 (ARB Apr. 11, 2002) citing Tolbert v. Queens Coll., 242 F.3d 58, 75-76 (2d Cir. 2001) (noting that in the Federal Courts of Appeals, it is a "settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"); United States v. Hayter Oil Co., 51 F.3d 1265, 1269 (6th Cir. 1995) ("It is not our function to craft an appellant's arguments."); United States v. Dunkel, 927 F.2d 955, 956 (7th Cir.1991) ("A skeletal 'argument', really nothing more than an assertion, does not preserve a claim [for appellate review] . . . . Judges are not like pigs, hunting for truffles buried in briefs.").

[47] We find that Entergy's decision to make Patrickson attend the meetings, though arguably an adverse action, is not relevant here because it occurred before May 8, the day Bono became aware that Patrickson had filed the ERA complaint. Thus, Patrickson's protected activity could not have contributed to the Entergy's decision that he had to go to the meetings with Howse and Bono. The ALJ seems to have made the same determination. See R. D. & O. at 43-44.

[48] See CX-74.

Patrickson described the biweekly meetings with Bono as "very hostile, very derogatory, very negative" and that Bono never gave him any constructive feedback.[50] Even so, and though such meetings may be difficult and "very stressful," we find no evidence that the biweekly meetings Patrickson attended were hostile, derogatory and negative. During their testimony, neither Patrickson nor Bono elaborated on the tenor of the bi-weekly meetings. Bono's notes only recite what he and Patrickson discussed at the meetings and his opinions about Patrickson's performance, i.e. "Carl is not progressing," "Carl's performance . . . have not met expectations," "I do not feel action of PIP was accomplished . . . presentations were complete on time, but quality did not meet . . . PIP."

The recordings reveal the atmosphere at the meetings. As indicated earlier, Patrickson does most of the talking. He is obviously nervous. He is, understandably, defensive as he answers questions from Bono and Howse. He often rationalizes. During the September 2 meeting, either Bono or Howse (we cannot tell which of the two is speaking) sternly points out where Patrickson is failing, and during the September 29 meeting, one of the supervisors certainly presses Patrickson for answers as to why he is not completing projects. But these recordings reveal that the supervisors objectively queried Patrickson about his progress. The supervisors are not loud. They do not sound angry. They are objective.

In short, Patrickson did not present a preponderance of evidence that Bono and Howse treated him in a hostile, derogatory, or negative way during the bi-weekly meetings. Therefore, we find that the bi-weekly meetings do not constitute materially adverse action.

4. Contributing Factor

Patrickson cannot prevail unless he proves by a preponderance of the evidence that filing the ERA complaint contributed to Entergy's decision to terminate him.[51] Patrickson can succeed either directly or indirectly. Direct evidence is "smoking gun" evidence that conclusively links the protected activity and the adverse action and does not rely upon inference.[52] Patrickson did not produce direct evidence. Therefore, he must

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49 Tr. 181.

50 Tr. 99.

51 See 42 U. S. C. A. § 5851(b)(3)(C); Kester, slip op. at 7.

proceed indirectly, or inferentially, by proving, by a preponderance of the evidence, that the reasons Entergy offered for terminating him are not the true reasons for the termination, but instead are a pretext for retaliating.[53] If Patrickson proves pretext, we may infer that his protected activity contributed to the termination, though we are not compelled to do so.[54]

The ALJ's Pretext Findings

Before the ALJ, Entergy contended that it took adverse action against Patrickson because of his poor performance. It argued that Patrickson had 17 different performance problems.[55] The ALJ did not examine each of the 17 performance problems individually, but instead addressed several examples, which he categorized as either "one-time incidents" or "systemic problems."[56] The one-time incidents included Patrickson's falsely accusing another employee of lying, charging expenses to a project outside his authority, failing to bring a chlorine injection system safety issue to the attention of management, failing to identify critical improvement goals for his system, and being late for training. The ALJ found that these one-time incidents alone did not justify Entergy's adverse action.[57]

The ALJ identified two "systemic problems": (1) Patrickson's failure to keep his system health reports up to date and (2) failure to resolve the hot water boiler modification issue.[58] He found that these systemic problems were not legitimate reasons for Entergy's adverse action because Entergy was treating Patrickson differently from similarly situated employees.

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[52] Coxen v. UPS, ARB No. 04-093, ALJ No. 03-STA-13, slip op. at 5 (ARB Feb, 28, 2006).

[53] Jenkins, slip op. at 18.

[54] See St. Mary's Honor Center v. Hicks, 509 U. S. 502, 511 (1993).

[55] R. D. & O. at 47; Entergy's Post-hearing Brief at 20-25; Tr. 345-351; RX-16.

[56] R. D. & O. at 47.

[57] R. D. & O. at 48.

[58] Id.

Regarding the system health reports, the ALJ cited evidence that several other employees had overdue system health reports, but Entergy did not take adverse action against them. As for the hot water boiler modification project, Patrickson argued to the ALJ that he should not have been responsible for this work and that therefore he could not complete it. "Taking [Patrickson's] version of the facts as true," the ALJ found that Entergy held Patrickson responsible for this project, but it did not typically require employees to take work with them when they transferred to a different department.[59] The ALJ also found it especially compelling that Entergy did not terminate Rodney Angus, who had been on a PIP for three years, but terminated Patrickson, who had been on a PIP for five months.[60]

Thus, having found that Entergy's reasons for terminating Patrickson were either "one-time incidents" or amounted to "systemic problems," and that Entergy treated Patrickson differently than some other employees, the ALJ found that Entergy's reasons were a pretext for terminating Patrickson.[61]

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[59] R. D. & O. at 48.

[60] Id.

[61] R. D. & O. at 49. At R. D. & O. at 45, 47, 49, the ALJ appears to confuse the employer's burden of producing legitimate non-discriminatory reasons for its action with its opportunity to later prove by clear and convincing evidence that it would have taken the same action in the absence of protected activity. *Compare Texas Dep't of Comm. Affairs v. Burdine*, 450 U. S. 248, 254 (1981) (employer need only "produce" evidence of legitimate reason to rebut employee's prima facie inference of discrimination) with 42 U. S. C. A. § 5851 (b)(3)(D) (employer avoids liability if it proves by clear and convincing evidence that it would have taken the same action in absence of protected activity). Moreover, the ALJ concluded that Energy's reasons for terminating Patrickson were pretext after he concluded that Entergy did not prove by clear and convincing evidence that it would have terminated Patrickson in the absence of his protected activity. This adds to the confusion. The "clear and convincing" affirmative defense available to the employer arises after, not before, the employee proves, by showing pretext, that the employer violated the Act. Thus, it appears that the ALJ, in effect, required Entergy to prove by clear and convincing evidence that its reasons for terminating Patrickson were not pretext. If this is what the ALJ intended, it constitutes reversible error. Strangely, earlier in his decision, the ALJ correctly states the ERA's burdens of proof, standards of proof, and evidentiary framework. See R. D. & O. at 3.

The Request to Terminate Memo

As we wrote earlier, when the ALJ considered Entergy's justification for its adverse action, he examined the reasons for termination articulated in Entergy's post-hearing brief.[62] We find, however, that Bono's Request to Terminate memo specifies the four reasons Entergy terminated Patrickson.[63] Bono's notes for September 29, 2003, state his opinion that Patrickson had just completed "the worst two weeks of performance since [his] being placed on PIP."[64] Bono decided that Patrickson's performance was deteriorating and was not likely to improve.[65] Therefore, on October 6, 2003, Bono prepared the memo. Ted Sullivan, Site Vice President, reviewed the memo and agreed with Bono's recommendation because Patrickson had not improved on his PIP and his performance was declining.[66] Bono's Request next went to Brian O'Grady, General Manager for Plant Operations, and to Glen Zimmerman, Human Resources Director, both of whom approved the termination. After internal counsel review, Entergy's Chief Executive Officer and Chief Operating Officer authorized Patrickson's termination.[67]

Thus, the reasons given in the Bono memo are what Entergy relied upon to decide to terminate Patrickson, effective November 20, 2003, while the reasons set forth in Entergy's post-hearing brief are those developed during the litigation process five months after Patrickson's termination. Therefore, we turn to the four reasons and provide relevant background for each.

(1) Patrickson did not meet due dates of action items in his PIP, including an item that was three months overdue. As an assistant engineer in the systems engineering group, Patrickson was responsible for monitoring systems for efficient operation and

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62 R. D. & O. at 45-49.

63 RX-20. CX-76 is entitled "Site Request for Termination" and dated October 22, 2003. This document repeats the reasons contained in Bono's memo verbatim, and appears to reflect upper management's approval of Bono's memo.

64 RX-16 (9/29/03).

65 Id.

66 Tr. 308.

67 Tr. 253, 285-286.

proper maintenance. When a system did not perform well, his job was to develop a plan to determine what was causing the problem and how to fix it.[68] The overdue action items in his PIP were system health reports, the hot water boiler (HWB) modification project, identification of three to five critical issues for his systems, and the HWB fuel oil project.[69] The item that was three months overdue was the HWB modification project, an assignment Patrickson carried with him when he transferred from the field engineering group to the systems engineering group.[70] According to Bono, two days before the modification was due, another engineer discovered that Patrickson had incorrectly closed out a corrective action item for the modification, stating that all testing requirements had been specified.[71]

(2) Patrickson was late for a scheduled training session. According to Bono, Howse informed him on September 23 that Patrickson was late for training that day. Bono testified that every employee at the nuclear station knew that training was a serious issue and that being late for training signified a lack of respect for the program.[72]

(3) Patrickson had made no progress on resolving problems with the hot water boiler system. As stated above, the HWB modification was a responsibility Patrickson brought with him from the field engineering group. This project was in the category of Maintenance Rule a(1), which meant that the system was not performing well.[73]

(4) Patrickson was three weeks behind schedule on the chlorine injection project. Patrickson misled Bono concerning his progress on the chlorine injection project. Chlorine is hazardous, and Patrickson failed to identify a critical safety issue relating to this project.[74] During one of the bi-weekly meetings, Patrickson told Bono that he did

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68 Tr. 330.

69 CX-1.

70 Tr. 17; Patrickson's Post-hearing Rebuttal Brief at 12.

71 Tr. 356-357.

72 Tr. 365.

73 Tr. 330.

74 Tr. 346-347.

not realize that the chlorine system was an industrial safety issue.[75] At later meetings, he kept assuring Bono that the chlorine injection test was on schedule and that he would complete it on time.[76] Then he finally admitted that his status updates had been inaccurate.[77] Furthermore, the test Patrickson finally wrote had the wrong number of valves and was the wrong type of test.[78] Bono was convinced that Patrickson did not review the test requirements before preparing the test, but Patrickson insisted that he had reviewed the requirements. According to Bono's notes, it would be impossible to miss the change in the type of test, as Patrickson had done, if he had reviewed the test requirements.[79]

Entergy's Reasons Are Not Pretext

We find that Patrickson did not prove by a preponderance of the evidence that Entergy's reasons for terminating him constitute pretext.

First, Patrickson did not prove or even argue to the ALJ or this Board that any of Entergy's four reasons for his termination are false. Nor does he challenge Bono's opinion that he was performing poorly and not progressing on his PIP. Thus, he does not deny that he was late on his action items, that he had been late for training, that he had made no progress on the HWB modification project, and that he had misled Bono about his progress on the chlorine injection project. The ALJ's characterization of Patrickson's lying to Bono about the chlorine injection project as a "specious," "one-time incident" is disturbing. Though Entergy did not argue the point, it would seem that lying to a supervisor about a hazardous situation at a nuclear power plant could and perhaps should, by itself, warrant termination.

Secondly, the record does not support the ALJ's finding that Entergy treated Patrickson differently than similarly situated employees. True, Entergy did not dismiss Angus, who had been on a PIP for three years, but did dismiss Patrickson, who had been

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75 Id.

76 RX-16 (9/29/03) and (10/1/03).

77 RX-16 (10/1/03).

78 RX-16 (9/30/03).

79 Id.

on a PIP for only five months.[80] Angus, however, was not a similarly situated individual. He was a fire protection assistant engineer who, unlike Patrickson, had shown steady improvement over the years he was on a PIP. And according to Bono, Angus's supervisor, Angus met all deadlines.[81] Patrickson met none of his PIP deadlines.[82]

The ALJ also found that Patrickson received disparate treatment with regard to system health reports.[83] He found that other employees failed to complete their system health reports on time but were not terminated. Other employees, however, did not have the additional performance problems that Patrickson had. In addition to failing to meet due dates on his system health reports, Patrickson also failed to meet due dates on the HWB modification and the chlorine injection projects. He also misled Bono about the chlorine injection project.[84]

Patrickson and the ALJ cite another example of Entergy's disparate treatment. Since other employees did not take projects with them when they changed departments, holding Patrickson responsible for the HWB modification project was a pretext.[85] But Patrickson agreed to take the hot water boiler project with him when he transferred from the field engineering group to the systems engineering group.[86] Patrickson also argues that Entergy relieved him from the HWB project, but, under the terms of the 2003 PIP, reassigned him to that project after he engaged in protected activity. Again, however, the record does not support this argument. Patrickson's protected activity occurred on April 22, 2003, when he sent the letter (ERA complaint) to OSHA. Entergy, through Bono, did not know about this activity until May 8. Therefore, since Entergy made the decision to reassign Patrickson to the project and included it in the 2003 PIP before May 8, it could not have been retaliating because of protected activity.

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80 R. D. & O. at 48-49.

81 Tr. at 180, 186.

82 RX-16.

83 R. D. & O. at 48.

84 CX-76.

85 Appellate Brief at 24; R. D. & O. at 48.

86 Post-hearing Reply Memorandum at 12.

CONCLUSION

We must reverse the ALJ's decisions and orders and DENY Patrickson's ERA complaint because he did not prove by a preponderance of evidence that Entergy's reasons for terminating him were a pretext. Therefore, he did not prove an essential element of his case, that is, that his protected act of filing this complaint contributed to Entergy's decision to terminate him.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge